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INTRODUCTION.

In Illinois, as in the other States of the Union, there has been a particular development of the law in regard to the appropriati~~ng~~on of property for public uses. This is due to a difference in the interpretation of the common law in regard to the exercise of the right of eminent domain and the constitutional provisions and the great amount of supplementary legislation on the subject. It is the purpose of this paper to discuss the development of the right of eminent domain, the nature of a public use, and the different uses for which property may be appropriated. The question of damages and proceedings, which are of more interest to the lawyer than a student of political science, will be left practically untouched.

Chapter 1.

EMINENT DOMAIN

Eminent domain occupies such a complicated field in our common law that before we attempt to define this term it is best to first consider State control of property in general, and then advance towards the particular phase of eminent domain.

The rights which a State has over property may be divided into two classes; the right over public property, and the right over private property. Over public property the State has the right of proprietorship and can pass such acts as are deemed necessary for the attainment of the public good. Public buildings, highways, navigable rivers, and property held by the State in a private capacity, as public lands, are examples falling under this class.

The rights and powers which a State has over private property are more complicated. In Lewis on Eminent Domain these powers are divided into six classes.[1]

First. The State may regulate the making of contracts between citizens in respect to property and make enactments for the acquisition and disposition of property as the public welfare requires. Examples of such regulation are to be found in the Statute of Frauds and the Statute of Wills.

Second. The State may take the property of one person and give it to another in order to enforce some legal obligation which the first person owes to the second. Laws of attachment and forced sales of property are examples of this class.

Third. The State may take the propertyof an individual as a

[1] Chapter 1.

fine for the violation of the law.

Fourth. The State may regulate the use of property in the interests of the public health, safety and convenience. Familiar examples of this is to be found in the regulation of public amusements, in building regulations in regard to safety, and in the control of noxious trades. This power is commonly called the Right of Police Regulation.

Fifth. The State may exact of the individual a contribution of a portion of his property based upon some principle of apportionment, or the possession of some privelege, in order to provide a fund for meeting the expenses of carrying on the government. This power is called Taxation.

Sixth. The State may appropriate the property of a person for the purpose of making it subservient to the common good. In this manner private property is taken by the State or by some corporation or private person authorised by the State for public uses such as railways, turnpikes, parks, or for such uses which are more of a private nature as mills and private ways. Such acts as are included under this division are spoken of as being under the right of Eminent Domain.

EMINENT DOMAIN. The courts have been divided as to the nature of the power of eminent domain ever since the term was coined by Hugo Grotius. Grotius says[1] "*Facultas* is twofold, namely, *vulgaris*, which exists for private use, and *eminens* which is superior to the *jus vulgaris* since it belongs to the community". Again he says,[2] "The property of subjects is under the power of eminent domain of

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[1] De Jure Belli ac ~~et~~ Pacis, lib.1,cap.1.
[2] Idem lib. iii,cap. xx.

of the State; so that the State, or he who acts for it, may use and even alienate and destroy such property---- for ends of public utility, to which ends those who founded civil society may be supposed to have intended that private ends should give way." Vattel also gives expression to the same view:[1] "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity and for the public safety, of all the wealth contained in the State, is called the eminent domain . It is evident that this right is, in certain cases, necessary to him who governs; and consequently is a part of empire, or sovereign, power." Indeed this is the general view of the jurists down to our own days; but madern writers would not limit the exercise of the power to the demands of "public safety", contending that the public welfare, necessity or convenience are equally proper grounds upon which to base the exercise of the power.

In the Encyclopedia of the Laws of Egland it is said:[2] "The right of the State or the sovereign to its or his own property is absolute, while that of the subject or citizen to his property is only paramount. The citizen holds his property subject always to the right of the sovereign to take it for a public purpose. This right is called 'eminent domain' ".

From the last definition one would would be inclined to conclude that the principle underlying the right is of feudal origin, viz., that the sovereign as the sole allodial owner in the realm could very properly exercise such a right over his feudatories.

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[1] Droit des Gens, lib. i, cap. xx.
[2] Vol. iv, p. 486.

The older jurists as a whole were very particular to deny this theory, possibly actuated by the fear of giving a fillip to autocracy in Europe if they were to avow the truth of the matter. However this may be, we find that the right is declared to be one exercisable by the sovereign power in the interests of the State; and instead of being regarded as one of the personal prerogatives of the State, it is rather upon the basis of trustee for the public that the sovereign is said to be clothed with the right of eminent domain. The right simply exists as a necessity.

This opinion seems to be the better founded for the doctrine of eminent domain applies to personal property as well as real property, and, in fact, such a reserved right has never been mentioned in any land grant or deed. The majority of our States in the United States follow this opinion[1], but some[2] still hold to the reserved right theory.

Cooley in his "Constitutional Limitations"[3] defines eminent domain as "the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, and welfare may demand". Mills on Eminent Domain[4] defines this power as "The power of the sovereign to condemn property for public use". This definition has been criticised as being too narrow[5]. Such definitions seem to be influenced by the fact that most of the State constitutions limit this power to "public

[1] Moran v. Ross (79 Calif. 159)
Hayward v. Mayor etc. N.Y. (7 N.Y. 314)
Noll v. Dubuque R.R. Co. (32 Ia. 66.)
Scholl v. German Coal CO. (118 Ill. 427)

[2] Todd v. Austin (34 Conn. 78), Harding v. Goodlett (3 Yerg.47)

use".

<u>The Illinois Rule</u> is well stated in German v. Scholl Co.[6] In that case the court said, "The right to take private property for public use is generally conceded to be an attribute of sovereignty; and being such it is not within the power of the State, by legislation, grant, or otherwise, to surrender or barter it away. Being inherent, it exists independently of written constitutions or statutory laws, yet, in free governments like our own, where private rights are secured by wholesome laws and constitutional restrictions, the power to take private property for common welfare remains dormant until the terms and conditions upon which it is to be exercised have been prescribed by legislation. The power or right in question is by some referred to the feudal theory of tenure----by others to the implied compact theory; but the better opinion , perhaps, is that it is founded upon public utility and necessity."

[3] P. 642.
[4] Section 1.
[5] Lewis Eminent Domain Section 2.
[6] 118 Ill. 427

Chapter ii.

THE TAKING FOR PUBLIC USE

What Is Public Use. Hugo Grotius who was among the first to formulate the principles of eminent domain says[1],"This also is to be noted that a right, even when it has been acquired by subjects, may be taken away by the king ----- by force of eminent domain ---- but to do this by the force of eminent domain , there is required in the first place, public utility".

Several States including our own restrict the exercise of the right of eminent domain to the taking for "public use". Judge Cooley in discussing the meaning of this term says;[2] "We find ourselves at sea when we undertake to define in the light of judicial decisions what constitutes a public use". Judges have preferred to decide individual cases according to the settled practice and have avoided giving any clear cut definition. In general public use is conceded to be public usefulness, utility, or advantage or what is productive of general benefit; and any appropriating of private property by the State under the right of eminent domain for purposes of great advantage to the community is a taking for public use.

The view taken by the courts of Illinois is expressed in the case of Scholl v. German Coal Co.[3] where the court said,"The expression 'public use' ex vi termini, implies an interest or right of some kind in the public and as the public can have no existence separate and apart from the people, of which it consists, it follows, that this interest or right, whatever it is, belongs to and is vested in

[1] De Jure Belli ac Pacis ii, 14, 7.
[2] Cooley's Constitutional Limitations p. 532.
[3] 118 Ill 427.

the people ---. If the use is a continuing one, as it is in all cases where property is taken for the purpose of a public ferry, railway, or the like, the right or interest of the public is co-extensive with the use to which it is annexed, and not within the power of those exercising the right to deprive the people of the benefits resulting therefrom".

The Use May Be Limited Or Local. It is not necessary that the benefit be general and be enjoyed by all. It may be local and limited. In fact every public use is, to some extent, local and the benefits to one part of the country more than to others. This is true of railroads, canals, and all public works.

Not Affected By Agency Employed. In order to exercise the right of eminent domain for public use it is not necessary that the public own or operate.[1] The right to exercise this power is derived from the State, but the right may be delegated. The true test for the exercise is the object to be accomplished and not the instrument employed.[2]

The Magnitude Of Interest Involved. The magnitude of interest involved seems to have been a deciding feature in the decisions of some of the States. In Pennsylvania the legislature may constitutionally authorize a railway company to canstruct a lateral road to a private mine. The mining industry of that State is of so great importance that the construction of such a branch road was held to be increasing the facilities for developing the State and for the general welfare[3]. In Illinois in a similar case[4] which arose when

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[1] Harvey v. Aurora and Geneva Ry. Co. 186 Ill. 295.
[2] Am. and Eng. Ency. of Law, p. 1063
[3] 3 Am. & Eng. R. Cas. 186
[4] Scholl v. German Coal Co. 118 Ill. 427.

the mining industry was not developed to a great extent the opposite view was taken by the Supreme Court. If this case had been delayed a few years a different decision might have been reached for the doctrine seems to be following a particular development best suited to the needs of the people.

Use May Be Both Public And Private. The public must be to some extent entitled to enjoy or use the property, not as a mere favor or by permission of the owner, but by right.[5] In some cases this use may be both public and private, but in such cases it is essential that the private use be incidental to the public use and not inseparable from it, as in a case[6] where a strip of land was condemned for a switch or side track of a railway corporation, it is no valid objection to show that the switch runs to a village water works and may be used for private use. In that case the court said, "It is insisted that this is a mere private use, and that the track was built to serve this use, and because the company was obliged to build by the requirement of the ordinance. This certainly shows that the track does serve this private use, and that it was designed to do so -----. But,if in addition to serving such use, the track be one which is necessary for the convenient operation of the main line of the railroad, then it may properly come within the purview of a side track. A side track can surely be none the less such, because, in addition to the purpose of the side track proper, it subserves some other private individual use."

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[6] C. & E. I. R.R. CO. v. Wiltse 116 Ill. 449
[6] Chicago etc. v. Garrity 115 Ill. 155.
[5] Millet v. People 117 Ill. 294.
[6] South Chicago R.R. Co. v. Dix 109 Ill. 237.
[5] Scholl v. German Coal Co. 118 Ill. 427.

Use Declared Public By The Legislation. In providing for the condemnation of private property, the legislature, evidently, must detirmine, in the first instance, whether or not the use for which the property is taken is public. In the case of Lake Shore etc. R.R. Co. v. Chicago etc. R.R. Co.[1] the court said, "The power to take private property for public use is one of the recognized rights of sovereignty and is one of the attributes inherent in the State. The power to declare under what circumstances that right may be exercised, and to provide the mode of its exercise was conferred upon the General Assembly by that clause of the constitution which vested in that body 'the legislative powers of the State' ".

While the action of the Legislature does not detirmine whether a use is public it will gain respect from the courts, especially in a case where there is some reasonable foundation for the taking, and in a case where property is taken by the State the courts are more likely to declare the use to be public than where the property is taken by a private corporation.

Courts Will Not Inquire Into The Expediency Of The Legislation And The Motives Of The Legislators. The legislature is made the exclusive judge of the necessity or emergency justifying the exercise of the power, and the courts will never question the motives of the legislators.[3]

The Question of Public Use A Judicial One. The exercise of the right of eminent domain is subordinate to all statutory and constitutional restrictions on the subject[2], and to the further

[1] 97 Ill. 506.
[2] C.&E.I. R.R. Co. v. Wiltse 116 Ill. 449.
[3] Dunham v. Hyde Park 75 Ill. 371.

limitations of the courts which are authorized to entertain applications for its exercise.[1] They are clothed with ample power to prevent any abuses of the right, and from the statement of facts it must be clearly shown that the use for which the land is sought is a public one.[2] However, unless there is a manifest injustice, oppression or gross abuse of the power in the action a court of equity will not interfere with the exercise of descretion vested in them.[3]

The Constitutional Limitation. Article 2, section 13 of the Constitution of Illinois reads, "Private property shall not be taken or damaged for public use without just compensation ----".

Property Cannot Be Taken For Private Use. The Constitution does not prohibit the taking for private use but the courts of this State have repeatedly decided that this cannot be done.[4] The courts of several States have come to this same conclusion but have based their conclusion on several different grounds,[6] some putting it on the ground of an implied prohibition in the eminent domain provision of the Constitutions;[5] some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land,[7] others on the ground that it would be subsersive of the fundamental principles of free

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[1] Dunham v. Hyde Park 75 Ill. 371.
R.R. Co. v. Wiltse (116 Ill. 449)

[2] Smith v. Chicago etc. R.R. Co. (105 Ill. 511)

[3] Dunham v. Hyde Park (75 Ill. 371)

[4] Nesbitt v. Trumbo(39 Ill. 110)
Crear v. Crosby (40 Ill. 175)

[5] Bankhead v. Brown (25 Iowa 540)
Concord Ry. v. Genly (17 N.H. 47)
Dalles v. Druhart (16 Or. 67)
State v. Lyle (100 N.C. 497)

[6] Lewis Eminent Domain

government,[8] or contrary to the spirit of the Constitution.[9]

The Law Of Illinois as laid down in Nesbitt v. Trumbo et al.[0] follows the second rule. In this case Justice Walker said, "The record presents the question whether the act authorizing a private way, to be established over the land of an owner against his objection, is constitutional. The provision is found in the ninety third section of the Act of 1861 (Sess. Laws, 263). The provision of our Constitution supposed to be violated by this enactment is the eighth section of article thirteen, and is this: 'No person shall be imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty , or property, but by the judgment of his peers or the law of the land.' Does the establishment of such a way across a man's land disseise him of 'his freehold' or deprive him of 'his property' as provided in this enactment, without the judgment of his peers, or contrary to the law of the land?--- These (cases cited) are the cases in which the principle in which the principle has been applied ---- And they seem to fully justify the objection that the law is unconstitutional.---- It (the way in question) was alone for individual or private use---- And to hold that the legislature might exercise this power would doubtless open the way to other and more serious encroachments upon the right of property which was designed to be secured by this most salutory provision.

[8] Hepburns Case (13 Bland 95)
'Bloodgood v. Mohawk & Hudson R.R. Co. (18 Wend 59)
[9] Matter of Tounsend (39 N.Y.4)
[10] 39 Ill. 110.

Chapter iii

PARTICULAR USES

Highways

One of the oldest and most common uses for which land may be taken is that of highways. All courts agree that this is a taking for public use. It is sometimes necessary for public convenience to construct roads which are mere *cul de sacs*. In the case of Sheaff v. The People[4] a road was held to be a public highway although it terminated against private land with no outlet. Also the road is none the less public because it terminates at a church, cemetry or farmhouse. Neither does the object of the traveler in using the road, whether for amusement or for business affect the public character of the road.

Certain Roads Declared Public Highways By Statute. "All roads in this State which have been laid out in pursuance of any law of this State, or of the territory of Illinois, or which have been established by dedication or used by the public as a highway for fifteen years, and which have not been vacated in pursuance of law, are hereby declared to be public highways". Ill. Rev. Stat. Ch. 121,Sec.1.

Condemnation Of Land. Comissioners of highways may condemn lands under the right of eminent domain for location of a road[1], may widen a road to sixty feet[2], and enter adjoining lands to construct drains[3], and may acquire gravel, rock, and building material on adjoining lands where such material is necessary for the construction and maintenance of roads.[1]

[1] Ill. Rev. Stat. Ch. 121, Sec. 272. [2] Idem Sec. 31. [3] Idem Sec. 8.

[4] 87 Ill. 189.

Public Wharves And Warehouses

Where wharves and warehouses are necessary for landing passengers and handling freight they are of such a nature as to be considered a public use, but in Illinois their location by condemnation is not, as yet, a fixed right.[1]

Government Purposes

Private property may be condemned by the general government for establishing forts,[2] post offices,[3] dock yards,[4] court houses,[2] military camps, light houses,[3] barracks,[2] custom houses,[2] armories, and arsenals.[3]

Cemeteries.

Cities, villages, and townships are given the right by statutory provision to establish cemeteries, within and without the corporate limits, and to acquire the lands therefor by condemnation or otherwise.[5] This right is also given to two or more cities, villages, or townships where such wish to unite in maintaining a cemetery.[6]

Six or more persons may organize a Cemetry Association with the right to purchase land but have no power to acquire land by condemnation proceedings.[7] However, when such an association has once established a burial grounds it can condemn additional ground whenever such may be needed.[8]

[1] See Chicago Dock Co. v. Carrity (115 Ill. 155)
[2] U.S. v. Fox (94 U.S. 315)
[3] Kohl v. U.S. (91 U.S. 367)
[4] Harris v. Elliot (10 Pet. 25)

[5] Ch. 21, Sec. 5. [6] Idem Sec. 6. [7] Idem Sec. 38. [8] Idem Sec. 49.

Railways.

The appropriation of property to the construction or use of a railway for the transportation of persons or property is an appropriation for public use[1], the public having an interest in the railway[2]. Under the Constitution of Illinois 1848 railroads were not considered common highways[3] as they noe wre. Article 11, Section 12 of the present Constitution reads, "Railways are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon under such obligation as may be prescribed by law."

It is well established on decisions that property may be taken for a right of way,[2] a freight or passenger depot,[4] stock yards,[4] work shops[7], paint shops[5], elevators, corn cribs, lumber yards, and lime houses[6] where such uses are necessary for the construction and operation of the railway.[7]

Branches Or Lateral Lines. In general, the right of a railroad to condemn property for the construction of branch road or lateral line depends upon the express words ar necessary implication of the charter or statutory provisions. In the case of C. & E. I. R.R. v. Wiltse[8], it was held that the grant of the power of eminent domain to the corporation should be strictly construed. The court said,

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[1] Penn. Mutual Life Insurance Co. (141 Ill. 35)
C. R. I. & P. R.R. Co. v. City of Joliet (79 Ill. 25)
[2] C. & W. I. R.R. Co. v. Ayres (106 Ill. 511)
[3] The Central Military Tract Co. v. Rocafellow (17 Ill. 541)
[4] C. B. & Q. R.R. Co. v. Wilson (17 Ill. 126)
[5] Low v. G.& C. R.R. Co. (18 Ill. 325)
[6] Ill. Central R.R. Co. v. Wathen (17 Ill. 582)

[7] See Illinois Revised Statutes, Chapter 114, Section 18.

[8] 16 Ill.449.

"Therefore, the mere fact that the building of lateral branch roads may add to the earnings of the main line of a railroad company or increase its business, will not authorize such corporations to build the same under its charter which fails to so provide."

Spurs. Spurs differ from lateral roads or branch lines in that they are built to private establishments while the latter are constructed to reach some particular part of the country. The right to condemn private property for the use of spurs depends somewhat upon circumstances of the case and the statute under which the right is claimed, but the tendancy in this State has been to treat spurs as private uses.

In a case where a brick yard was three-fourths of a mile distant from the railroad, a spur was refused as being for a private purpose[1] In Fisher v. Chicago etc. R.R. Co.[2] where a railroad company had a side track for many years before, connecting its main line with a public warehouse and elevator, in a town, over the land of another, but without having right of way therefor except by the mere consent or license of the owner, it was held that the company had the right to institute proceedings to condemn the land over which such branch ran for the right of way. In another case[3] the court said, "All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indescriminately and under the public control to the extent that railroads generally are, they are tracks for public use. It may be --- that such tracks will be used almost

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[1] 116 Ill. 449. Chi. etc. R.R. Co. v. Wiltse

[2] 104 Ill. 323.

[3] Chicago Dock etc. v. Garrity (115 Ill. 155)

entirely by the manufacturing establishment, yet if there is no exclusion of an equal right of use by others, and this singleness os use is simply the result of location and convenience of access it cannot affect the question." In this case it was a question of laying track down a street by permission of the city council under the incorporation act of the City of Chicago, the track to connect a public warehouse with the railway company.

In these cases as well as in others[1] the circumstances have been so material to the decisions that it is impossible to establish a general rule.

Condemnation Of Property. The statutory provision[2] in regard to the condemnation of private property by railroad corporations reads,"If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its corporation, or the transaction of its business, or for its depots, station buildings, machine shops, or for right of way, or any other lawful purpose connected with or necessary to the building, operating, or running of said road, such corporation may acquire such title in the manner that may now and hereafter be provided for by the law of eminent domain.

Acquisition Of Materials. Railroad corporations may by legislative enactments[3]," enter upon and take from any land adjacent to its road, earth, gravel, stone or other materials, except fuel and wood, necessary for construction of such road ---"

[1] Vincent v. C. & A. R.R. Co. (49 Ill. 33) Also see 143 Ill. 450.

[2] Chapter 114, Section 18, Illinois Revised Statutes.

[3] Idem, Chapter 114, Section 19.

Railroad Crossings. One railroad company may condemn a crossing over the right of way of another railroad Co.[1] under the right of eminent domain, but the whole question of railroad crossings has been mostly decided by statutes.

Chapter 75, Section 209 of the Illinois Revised Statutes requires that a railroad make a crossing of another railroad at such a place and manner as will not unnecessarily impede or endanger the travel or transportation upon the railway to be crossed. In the case of objection to the place or mode of crossing proposed by the company desiring the same, either party may apply to the Board of Railroad and Warehouse Commissioners and it shall be their duty to view the grounds, give each party a chance to be heard, and decide upon the manner and place of crossing. The damage, in case the parties fail to agree, shall be determined as is provided for by law.

Elevated Railways. are held to be similar to ordinary railways and the privileges which they have in regard to the right to condemn property is not materially different.[2]

Street Railways. Like ordinary railways, a street railway is of a quasi public nature and its use is of a public character. It is a common carrier of passengers and the right of eminent domain may be exercised to secure a right of way.[3]

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[1] St. L., J. & C. R.R. Co. v. S. & N. W. R.R. Co. (96 Ill. 274)

[2] Illinois Revised Statutes, Chapter 32, Sections 69,70,32, 3,73.

[3] Idem Chapter134, Section 1.

Drainage, Ditches and Levees.

In some of the States without express constitutional provisions statutes have been passed giving the right to construct ditches, levees and the like through private property. Such laws have been upheld on the ground that when lands are so situated towards each other as to create a mutual dependence and a natural community the State has the right to apply a rule for their common benefit. Such legislation has been held good against the contention that it violated the Fourteenth Amendment of the Constitution of The United States.[1]

Such a doctrine has not been called for in Illinois for Article iv, Section 31 of the Constitution of Illinois reads, "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the land of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of the State, by special assessments upon the property benefitted thereby."

This provision has been supplemented by a great amount of legislation regulating the organization of drainage districts, assessments, surveys etc.[2] "Whenever a majority of the owners of land within a district proposed to be organized, who shall have arrived at lawful age and who represent one-third in area of the

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[1] Wurts v. Hoagland (114 U.S. 606)

[2] Ill. Rev. Stat., Chapter 42, Section 1.

lands to be reclaimed or benefited, desire to construct a drain--, ditch---, levee, or other work to be known in this act as a 'drainage and levee district' --- across the land of others for --agricultural, sanitary or mining purposes ---" may file a petition in the county court. Before the work is done the land is examined by a board of commissioners who judge upon the advisability of constructing such work.[2]

Canals.

Canals are public highways and where a uniform toll is charged they are considered as a public use for which property may be condemned[1], and all necessary stone, timber and other material for construction or repairs.[3]

School Houses

In a case where a school house site is selected and the compensation cannot be agreed upon by the school directors and the parties interested the directors may proceed to condemn the land under the exercise of the right of eminent domain: Provided, that no tract of land lying outside the limits of any incorporated city or village, and lying within forty rods of the dwelling house of the owner of the land, shall be taken for a school house without the owner's consent.[4]

Water Works.

A city, village or town is given the right by statute to acquire property by condemnation for the purpose of establishing

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[1] The People v. Wells (12 Ill. 102) [3] Ill. Rev. Stat. Ch. 20, Sec.3.
[2] For particulars see Ill. Rev. Stat. Chapter 42.
[4] Ill. Rev. Stat., Ch. 122, Sec. 152.

a water works and the jurisdiction of such village, city or town for this purpose extends five miles from the corporation.[1]

Right Extended to Chicago.

The Right Of Eminent Domain has been extended to the City of Chicago for acquiring property advantageous or desirable for municipal purposes, such right to be in conformity with the laws of the State.[2]

Minicipal Parks. "The City of Chicago may acquire by purchase or otherwise, municipal parks, play grounds, public beaches and bathing places, and improve, equip, maintain, and regulate the same.[3]

Sewerage

Cities have the power to construct drainage systems and to acquire the necessary property.[4]

Chicago Drainage District is given the right to condemn property for construction of drainage systems contemplated in the act relating to that drainage district.

Development of Mines.

The Constitution of Illinois[5] gives the legislature the right to pass laws permitting owners of lands to construct drains and ditches for mining purposes. The laws which have been passed in regard to development of mines have exceeded the power extended in the constitution.

1. Chapter 24, Section 170.	Illinois Revised Statutes.
2. Chapter 24, Sections 193as, 270a.	Idem
3. Chapter 24, Section 336a.	Idem
4. Chapter 24, Section 193.	Idem
5. Article iv., Section 31.	

In 1874 an act was passed reading, "Be it enacted --- That whenever any mine or mining place shall be so situated that it cannot be conveniently worked without a road or railroad thereto, or ditch to drain the same or to convey the water thereto, and such road, railroad or ditch shall necessarily pass over, through or under land occupied or owned by others, the owner or operator of any such mine or mining place may enter upon such land, and construct such road, railroad or ditch, upon complying with the law in relation to the exercise of the right of eminent domain." This same act also authorised commissioners of highways to lay out public highways, or private roads or cart ways from any coal mine to a public highway or railroad whenever the public good requires.

In 1877 the Supreme Court in the case of Scholl v. German Coal Co.[1] decided that the use of a strip of land by a coal company, upon which to construct a tramway leading from the coal works to a railroad track is a private use, and that land cannot be condemned for this purpose. Here the court departed from the rule established in some other States[2] where the taking of property for railroad switches to mines has been sustained on the ground that the development of mines is for the public benefit. In this case the court said, " The coal, works, and the present tramway are, in the strictest sense, private property, and the public, generally have no more interest in them or in the operation of

[1] 118 Ill. 427.

[2] See Hays v. Risher (32 Penn. St. 169)
3 Am. & Eng. R. Cas. 186

the works, including the tramway, than they have in any other strictly private business."

According to the ground taken in this case it is probable that the other provisions of this act will meet with the same fate when their constitutionality is questioned.

Public Ferries

"When it shall be necessary, for the establishment or use of any ferry, to take private property, for a landing, ferry house, or approach to any ferry, proceedings may be had under any act that may be in force for the exercise of the power of eminent domain, subject to all restrictions that may be prescribed by law."[1]

Sites For County Buildings.

Sites for county buildings such as court houses may be appropriated under the right of eminent domain.[2]

Mill Dam Privileges.

An interesting class of legislation is that which has been passed in respect to mill dam privileges. In a case where the dam is erected across a stream, the back water caused by this artificial arrangement generally destroys the use of some of the land above. This is clearly a case of taking private property, and since the owner of the land does not have any interest in the purpose for which the dam has been erected he does not share in

[1] Ill. Rev. Stat., Ch. 25, Sec. 23.

[2] Idem, Ch. 34, Sec. 108.

the benefit as in a case of compulsory drainage. Statutes in regard to this class of legislation have been enforced in Illinois and several other States from an early period. These acts- known as "Mill Acts" - were passed at a time when public mills were highly necessary, and land was of very little value. Corn meal was then about the only breadstuff and it was of such value that the overflowing of a few acres of land in constructing a mill dam was a detriment too small to consider.

Those statutes of Illinois are found in Laws of 1819, p. 264; Rev. Code of 1827, p.297; and Rev. Laws 1833, p. 449. These were limited to watermills, grist mills and saw mills, except that of 1819 which was confined to grist mills.

For a long time these acts stood unquestioned. In some of the other States such acts were held good.[1] The Supreme court of Massachussetts said,[2] " Whether if this is trenching too closely upon the great principle which gives security to private rights, it seems now too late to inquire, such legislation having been in full operation in this State a century and a half."

Under an act of Illinois in 1872[3] relating to mills and millers this privelege was extended to other than grist mills and taking of private property was authorized for erection and operation of mills generally, leaving the question of public use to the courts. This right was disputed in the case of Gaylord v. Sanitary District.[4] There the court said, "If this act were limited in

[1] See list of cases in Head v. Amoskeag Mnf. Co. (113 U. S. 9)

[2] Murdock v. Stickney (8 Cush. 113)

[3] Ill. Rev. Stat. 1874, p. 701.

[4] 204 Ill. 576.

its scope to manufactories which are of a public necessity, as grist mills in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such a case it would be essential that the statutes should require to be public in fact, in other words, that it should contain provisions entitling the public to accomodations." In that case the court held the statutes unconstitutional in so far as it applied to condemnation for other purposes other than grist mills.

Other Cases Of Flooding Land

In some of the other States the flooding of land has been permitted for such purposes as cranberry culture[1], fish culture[2] and the like, but such questions have never been legislated upon in Illinois. If such questions should arise there is no doubt but that the courts would follow the restricted policy established in the mill dam cases.

Parks.

The Illinois legislation in regard to parks is quite extensive. The acts in regard to appropriating private property for uses connected with parks will now be reviewed.

Altering Location Or Boundary Of Public Grounds. Whenever the corporat~~ive~~e authoritiyes of towns having control or supervision of any public parks, boulevards, driveways or highways, which have been located in pursuance of a vote of the people of such towns, desire to alter or change the location of the same or any of the boundary lines of the same, they may, by petition in writing, apply to the circuit courts of the county for leave to make such

1. & 2. Below.

change. Notice of this application must be made in some county neaspaper at least ten days before the application is made. All parties objecting may appear before the courts. If the court thinks the change is for the public good, it grants the corporative authorities the right to make the change and to acquire the additional land by purchase or condemnation proceedings as in other cases of the exercise of the right of eminent domain.[3]

Driveways To Parks.

If the park commissioners wish to open a driveway to a park they make an application to the board of trustees of the townin which it is proposed to make the same, if there be a board of trustees, and to supervisor and assessor, in case there is no board (the said board of trustees, and supervisor and assessor, being hereby declared corporative authorities for the purpose of this section) for leave to establish such driveway. If the commissioners wish to use any public street or road as driveway they may take such provided the consent of the owners of a majority of the lineal front feet of the property be first obtained in writing, and also the consent of the city council, trustees or commissioners according to whether the street or road is in a city, village, or within a township.[4]

Drainage

The commissioners may also acquire the right to construct necess-

[1] Mass. Rev. Laws Ch. 196, Sec. 39.
[2] Turner v. Nye (154 Mass. 579)
[3] Illinois Revised Statutes, Chapter 105, Section 4.
Idem, Sec. 7,8,9.
[4] Idem, Ch. 105, Sec. 26.

ary sewers for drainage, but such sewers must be constructed under such regulations as the board of public works or the proper authoratives of the city or town may prescribe.[1]

Driveways To Connect Different Parks

Sometimes two or more parks are so situated that it is desirable to connect them by boulevards. Section 38 of chapter 105 gives the commissioners the right to construct such a driveway and to acquire such property as may be needed for the construction.

Driveways to Public Parks

The board of park commissioners have the power to connect any public park, boulevard or driveway under its control with any park of an incorporated city, town or village, by selecting and taking any connecting street or streets or part thereof leading to such parks; and shall also have power to add to such parks, any street or part thereof which adjoins and runs parallel with with the boundary line of the park, Provided, that the street so taken is within the district taxable for the maintenance of such park: And provided further, that the consent of corporate authorities having control of any such street so selected, and written consent of owners of majority of frontage on streets is obtained. And provided further that the park commissioners may abandon and surrender any such street so taken back to the

[1] Ill. Rev. Stat. Ch. 105 Sec. 26, 32,33.

corporate authorities by getting permission of property owners and the corporate authorities.[1]

Commissioners May Widen Streets

Where streets have been selected and taken under control by park commissioners they may be widened to a uniform width of one hundred feet, provided that some portion of each mile of the street so selected shall be one hundred feet wide at the time of such taking, and the needed property may be acquired by condemnation.[2]

Exten~~t~~sion Of Boulevard Or Driveway.

The park commissioners may extend a boulevard or driveway along public waters by obtaining consent of the owners of two-thirds frontage of all lands abutting on such public waters and the consent of the corporate authorities of town or towns. In such cases the riparian rights may be obtained ~~gotten~~ by condemnation proceedings.[3]

Enlargement Of Lincoln Park.[4]

"Be it enacted ---- That in all cases where lands within specific boundaries have been declared to be a public park, for the enlargement of a public park, and provisions made for requiring the title to the land embraced within said boundary by purchase or otherwise, it shall be lawful to enlarge the boundaries thereof

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[1] Ill. Rev. Stat. Ch. 105, Sec. 49.
[2] Id. Sec. 70,71.
[3] Id. Sec. 85.
[4] Id. Sec. 99.

and to acquire lands and riparian rights by purchase or condemnation embraced in said limits --".[1]

"It shall be lawful for any board of commissioners of any such park to establish, construct and maintain a breakwater, as against waste from any lake or any public water, which in their judgment may be necessary to protect the land."[2]

Creation Of Pleasure Driveways In Park Districts.

Section 107 of chapter 105 enables an area of contiguous territory containing within its boundaries two or more incorporated cities, towns or villages to be incorporated as a pleasure driveway and park district with the power to take land for constructing pleasure driveways, boulevards and parks.[3]

Condemnation Of Riparian Rights.

When parks border on public waters and it is desirable to reclaim submerged land such riparian rights as are necessary may be condemned and taken.[4]

Park Districts may Annex property.

Park districts may annex property to parks already established but the petition to annex requires one hundred voters resident within the territory, and the question must finally be submitted to the people at a special election held for that pupose.[5]

Small Parks For Pleasure Grounds

Small parks for pleasure grounds may be located on any lots

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[1] Ill. Rev. Stat. Ch. 105, Sec. 99.
[2] Id. Sec. 100.
[4] Id. Sec. 128,176, 177.
[5] Id. Sec. 199.

or parcel of land which lies within the district and such land may be condemned for this purpose.[1]

Connecting Parks Bordering On Public Waters.

Connecting parks which border on public waters is permitted and such rights may be taken as are necessary for constructing bridges, tunnels or viaducts over or under the public waters or rivers.[2]

State Parks.

The question of the power of the State to take the right to historical sites of battlefields under the right of eminent domain has never been questioned in the courts of this State. If such a question should come up our courts would no doubt concur with the rule laid down in other States and hold this to be an exercise for public use.

Fort Massac Park. The first act in regard to state parks was passed in 1903[3] By this act a board of trustees, styled "Fort Massac Trustees" were created with the power to receive a conveyance from Hon. Reed Green, or other owners thereof, of the property, not more than forty acres in extent, which contained the site of Old Fort Massac, at a price not to exceed three thousand five hundred dollars. This board has acquired this property and have now made many improvements upon it. Some other of the historical sites in our State will probably be treated in this manner in the future.

[1] Ill. Rev. Stat. Ch. 105, Sec. 199.
[2] Id. Ch. 105, Sec. 235,236.
[3] Id. Ch. 105a

Special Assessments.

The queer position taken by our early State courts in regard to special assessments deserves mention. Although other States have [illegible] in their [illegible] had ~~some~~ vascillat~~ion~~ as to the source of the right of special taxation[1], Illinois seems to be the one State where the right has been directly held to be an exercise of the right of eminent domain rather than a form of taxation. In the case of eminent domain a question of benefit does not arise. Neither is there a question of apportioning as there is in special assessments. This fact would have kept the two powers seperated if there had not been another reason. The Illinois Constitution of 1848, section 2, article 9, declared that the General Assembly should provide for levying a tax by valuation, so that every person and corporation should pay a tax in proportion to his or her property. According to this provision a special assessmant apportioning taxes among those who received the benefit would have been found unconstitutional if there had not been some ground upon which to base its validity. Because of this fact the courts decided that a special assessment was not a tax at all but an exercise of the right of eminent domain[2] In those early cases[3] this explanation was simply used to justify a needed thing. When the present constitution was adopted in 1870 this clause was left out. Since then the courts have righted themselves and now hold[4] special assessments to be a form of taxation.

[1] New Orleans v. Drainage Co. (11 La. An. 338)
Striker v. Kelley (7 Hill 9)
[2] Chicago v. Colby (20 Ill. 614)
[3] Howard v. St. Clair Drainage Co. (51 Ill. 130)
Peoria v. Kidder (66 Ill. 351)

Wright v. Chicago (46 Ill. 44)
[4] White v. People (94 Ill. 604)
Chicago R.R. Co. v. Elmhurst (165 Ill. 148)

Chapter iv.

THE TAKING OF PRIVATE PROPERTY.

What amounts to a taking. "The entry upon land with the intention of permanently holding it, whether the interest claimed in it is a fee title or only an easement, ~~it~~ is of course a taking of property within the meaning of the constitutional provision requireing compensation for taking."[2]

In regard to the nature and degree of injury a piece of property must suffer before the case can be considered a "taking" there ~~are~~ is a great difference of opinion. In Illinois the Constitution reads "taken or damaged." These words have been liberally construed in order that an owner can secure compensation in cases where he has been substantially deprived of the use of his property. In Rigney v. Chicago[1] after mentioning the fact that some courts have decided against consequential damages, the court says: "But other courts of equal respectability, and as it is believed, with better reason, hold that the change of the grade of a public highway, or the erection of a public improvement of any kind, that causes any direct physical injury to the property of a private person by overflowing his land and the like, by reason of which he is substantially deprived of its ordinary use and enjoyment, is, within the meaning of the constitution, a taking of his property to the extent of the damage thereby occassioned."[3]

[1] 102 Ill. 64.
[2] Am. & Eng. Ency. of Law, Vol. 10, p.1102.
[3] Nevins v. Peoria (41 Ill.,502)
Gillham v. Madison (49 Ill. 484)
Shawneetown v. Mason (82 Ill. 337)
Stack v. East St. Louis (85 Ill. 377)

To allow compensation for injury damage must be special and not general as in a case where a whole neighborhood is damaged in common.[1] Injuries to the remainder of tract of which part has been taken,[2] damage to trade and business,[3] danger from fire,[4] danger of killing live stock,[5] injury from noise and confusion,[6] injury from obstruction of light,[7] injury from change of grade in a street,[8] and several other such detriments have been taken into account in assessing the damages sustained. The Illinois rule is a very liberal one.

The Property That May Be Taken. Generally speaking the right of eminent domain extends to all forms of property and to all interests in property. In the case of Met. City R.R. Co. v. Chi., the court, in speaking of this right, said, "Property in its broadest and most comprehensive sense, includes all rights and interests in real and personal property, and also in easements, franchisements, and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property. The right of eminent domain is an attribute of sovereignty, and whatever

[8] Quincy v. Jones (76 Ill. 231)
[7] Stock v. East St. Louis (85 Ill. 377)
[6] Chi. etc. R.R.Co. v. Nix (137 Ill. 141)
[5] Wilson v. Rockford etc R.R. Co. (59 Ill. 273)
[4] Chicago etc. R.R. Co.v. Aldrich (134 Ill. 9)
Jones v. Chi. R.R. Co. (68 Ill. 380)
Centralia etc. R.R. Co. v. Brake (125 Ill.393)
[3] Hohman v. Chicago (140 Ill. 226)
De Buol v. Freeport etc. R.R. Co. (111 Ill. 449)
[2] Keitsburg etc. R.R. Co. v. Henry (79 Ill. 290)
[1] Pekin v. Winkel (77 Ill. 57)
Stone v. Fairbury etc. R.R. Co. (68 Ill. 396)
Pekin v. Brereton (67 Ill. 479)
[9] 87 Ill. 317.

tangible or intangible; may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it."

Private Contracts being property, are consequently subject to condemnation. The effect on contracts is generally indirect arising from the condemnation of property to which the contract is relative.

Materials For Construction may be taken as in a case where it is necessary for a railroad company to condemn additional land in order to obtain enough dirt for a deep fill.[1]

Timber may be removed by railroad companies even if not on the right of way if such timber endangers the use of the right of way.[2]

Property Of Private Corporations is also subject to the right of eminent domain the same as property of private individuals.[3]

Property Already Devoted To Public Use. "To warrant the taking of property of one party, already appropriated to a public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use, and also that the change shall be for the benefit of the public. Whether the new use be a different use from the present one is a judicial question which the courts must decide. But where the new use, in its nature, <u>may</u> be a public benefit,

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[1] Hinde and Lesher v. Wabash N. Co. (15 Ill. 72)

[1,2] Also see under RAILROADS.

[2] Ill. Rev. Stat. Ch. 32, Sec. 70.

[3] The Peoria, Pekin & Jachsonville R.R. Co. v.The Peoria & S. R.R.Co. (66 Ill. 174)

[3] C. R. I. & P. R.R. Co. v. Town of Lake (71 Ill. 333)

whether the change <u>will</u> <u>be</u> for the benefit of the public is a political question, to be determined by a political department of the government, and generally, if not always, by the lawmaking power[1]."

While land held for a public purpose can be condemned for another public purpose when the latter is different from the former and consistent with the rights of the public under the first, such a change cannot be made as the taking of a public square for a school house site. Such would be inconsistent with the original use[2].

State Property. The Federal courts hald that State property is subject to the Federal power of eminent domain[3].

Statutory Exemption. In several States dwelling houses and other property similar have been exempted from the exercise of the right of condemnation[4], but in Illinois there has never been any such legislation passed.

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[1] L. S. & M. S. Ry. Co. v. C. & W. I. R.R. Co. (97 Ill. 512)

[2] Davies v. Nichols (32 Ill. App. 610)

[3] Stockton v. Baltimore (32 Fed. Rep.17)

[4] Curtis v. Smith (35 Conn. 156)
Cummins v. Shields (34 Ind. 50)
Willoughby v. Shipman (28 Mo. 50)
State v. Block (23 Wend. 360)